SUPREME COURT OF THE UNITED STATES.

No. 337.

THE MERCHANTS' INSURANCE COMPANY, APPELLANTS,

vs.

JAMES RITCHIE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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1 On the twenty-third day of April, A. D. 1866, the following bill is filed, viz:

Copy of bill, with exhibits.

Circuit court for 1st circuit.

UNITED STATES OF AMERICA,
District of Massachusetts:

To the honorable the justices of the circuit court of the United States of America for the first circuit and district of Massachusetts, sitting in equity:

The Merchants' Insurance Company, a corporation established under the laws of the Commonwealth of Massachusetts, having their usual place of business in the city of Boston, county of Suffolk, and 3d collection district of said Commonwealth, and within said district of Massachusetts, bring this, their bill, against James Ritchie of said Boston, and a citizen of the said Commonwealth, the assessor of said 3d collection district, and Edward L. Pierce, of said Boston, and a citizen of the said Commonwealth, the collector of said 3d collection district, and thereupon your orators complain and say that they did, on or about the 1st day of April, A. D. 1865, make and render
2 to the assessor of said 3d collection district, in duplicate, and verified by the oath of the secretary of the said company, a list or return containing a true and faithful account of the amount of duties due to the government on all dividends, in script or money, declared due or paid by the said insurance company, and on all the undivided profits thereof, from the 1st day of October, 1864, to the 31st day of March, 1865, both days inclusive, and with a marginal note thereon, referring to and and setting forth a certain extra dividend received by said company from the Suffolk Bank, as stockholders therein, a copy of which return and of the marginal note thereon, marked A, is annexed to and made a part of this bill.

And your orators further show that they offered to pay to the Commissioner of Internal Revenue, within 30 days after the time when the dividend in said return mentioned became due and payable, the duties on said dividend and on the profits over dividend declared in said return mentioned, but that the same were not then accepted.

And your orators further show that the aforesaid list or return contained, to the best of their knowledge and belief, a true and faithful statement of all matters therein set forth, and that the same was
3 not accepted by the assessor of said 3d collection district, and that on being informed thereof, to wit: on the 15th day May, 1865, the president of said company, Thomas C. Smith, esq., enclosed said return, or a true copy thereof, in a letter addressed to the Commissioner of Internal Revenue, at Washington, D. C., a copy of which letter, marked B, is hereby annexed.

And your orators further show that no answer to said communication was received, but that some conversation was had between the

secretary of said company and the said assessor of said 3d collection district, and that thereupon and in consequence thereof, to wit: on or about the 9th day of December, 1865, they made and rendered to said assessor in duplicate, and verified by the oath of the secretary of the said company, a list or return containing a true and faithful account of the amount of duties due to the government on all dividends, in script or money, declared due or paid by said company, and on all the undivided profits thereof, from the 1st day of October, 1864, to the 31st day of March, 1865, both days inclusive, and containing a special reference to a separate return therewith,

4 presented for the purpose of exhibiting the facts upon which exemption from duty on a certain sum received as extra dividend from the Suffolk Bank, was claimed by said company, and also made and rendered said separate return in duplicate, and verified by the oath of the secretary of said company as aforesaid, copies of which return and separate return, marked respectively C and D, are hereto annexed, and made part of this bill.

And your orators further show that they offered to pay to the Commissioner of Internal Revenue, on presenting said return and separate return, the duties on the dividend, and on the profits over dividend declared in said return mentioned, and that the same were accepted and were paid by them, to wit: on the 2d day of January, 1866.

And your orators further show that the aforesaid return and separate return contained, to the best of their knowledge and belief, a true and faithful statement of all matters therein set forth.

And your orators further show that the said assessor of said 3d collection district, to wit, James Ritchie, esq., has assessed upon

5 your orators, pursuant to instructions from the Commissioner of Internal Revenue, a copy of which, marked E, is hereto annexed, as tax upon the said sum received from the Suffolk Bank, as extra dividend as aforesaid, the sum of $5,760, and as additional duty or penalty for alleged refusal or neglect on the part of your orators to make the list or return required by law, the sum of $1,440, being twenty-five per cent. of said sum of $5,760, in all the sum of $7,200.

And your orators aver that said assessor of said 3d collection district had no lawful right or authority to assess such amounts, or any part thereof, or of any of them, but that such assessment is wholly illegal and void.

And your orators further show that said assessor has transmitted such illegal assessments to E. L. Pierce, of said Boston, collector of said 3d collection district, for collection, and he, as such collector, has demanded of your orators said sums, with more for delay, and threatened to seize and sell the property of your orators unless such sums be paid on or before the 30th day of April, 1866.

6 And your orators aver that said collector of said 3d collection district has no lawful right or authority to collect such duties, taxes, or penalty.

All which actings, doings, pretences, and refusals are contrary to

equity and good conscience, and tend to the manifest wrong and injury of your orators in the premises.

In consideration whereof, and forasmuch as your orators can only have adequate relief in the premises in a court of equity, where matters of this nature are properly cognizable and reliable, to the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief prayed for hereby, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, true, direct, and perfect answer make in the premises. Your orators pray this honorable court to issue a writ of subpœna, in due form of law, directed to the said James Ritchie and Edward L. Pierce, commanding them, under a certain pain therein to be limited, and at a certain time to appear before this honorable court and make such answer, and that they may abide such order and decree as the court shall make in the premises;
7 and that they, the said Ritchie and Pierce, may be restrained, by injunction, from the distraint and sale of the property of the petitioners in the collection of said assessments, and that they may be restrained from all further proceedings in making such collection, your orators hereby offering to bring into court said sums of money, and to deposit the same with the clerk to await and abide the final order, judgment, and decree of the court in the premises: and your orators further pray that said Richie and Pierce be ordered and decreed to pay your orators their costs in this suit, and that they may have such other and further relief in the premises as the nature of the circumstances of their case may require, and to your honors shall seem meet.

J. C. BRAMAN, *Secretary.*
FRANCIS W. PALFREY,
Complainant's Solicitor.
S. BARTLETT, *of Counsel.*

[50-ct. stamp, cancelled.]

DISTRICT OF MASSACHUSETTS, *April 23d, A. D.* 1866.

There personally appeared the said J. C. Braman and made oath that he has read the foregoing bill, by him subscribed, and
8 knows the contents thereof; that so far as they are stated upon his personal knowledge he knows them to be true, and so far as they are stated upon information and belief he believes them to be true.

Before me.

ELIAS MERWIN, *U. S. Com'ss'r.*

A.—(65.)

Return by banks, trust companies, savings institutions, insurance, railroad, canal, and turnpike companies, of dividends declared and paid, or payable.—(Sections 120–122.)

Account of all dividends, in scrip or money, declared due, or paid to stockholders, to policy holders, or to depositors, by the managers of the Merchants' Insurance Company, in the city of Boston, in the county of Suffolk, and third collection district of the State of Massachusetts, with the amount of tax thereon deducted and withheld from the persons to whom said dividends were paid, and of all the undivided profits of the said insurance company, from the first day of October, 1864, to the 31st day of March, 1865, both days inclusive, pursuant to an act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," approved June 30, 1864, viz:

Capital.	Net gains since prior dividend.	Rate of dividend declared.	Amount of dividend declared.	95 per cent. of dividend, being the whole amount paid to stockholders, &c.	5 per cent. of dividend retained as excise tax.
$500,000 00	$86,404 51	10 per cent. and tax.	$52,631 58	$50,000 00	$2,631 58
Profits over dividend declared, $33,772 93, 5 per cent. of which is					1,688 64
Total excise tax					4,320 22
Or amount taken from surplus fund to complete dividend, on which the tax of three per cent. has once been paid by the company, $, per cent. of which is					4,320 22
Total excise tax					

In January, 1865, this company paid to its stockholders $100,000, being part of the sum of $115,200 received for them as stockholders in the Suffolk Bank; being part of the accumulations laid aside by said bank before any act the United States levying a duty on such accumulations existed, said bank holding itself accountable to government for excise tax, if so decided on case now pending.

(Signed) J. C. BRAMAN, *Secretary.*

I, J. C. Braman, secretary, do swear that the above account contains, to the best of my knowledge and belief, a true and faithful statement of all dividends declared due, or paid, by the said insurance company, and of the undivided profits thereof, together with the amount of taxes which have accrued thereon, or should accrue, and not accounted for during the time, and according to the provisions of the act aforementioned.

(Signed) J. C. BRAMAN, *Secretary.*

Sworn and subscribed before me, this day of , 186 .

_____ _____,

Assistant Assessor.

N. B.—The "undivided profits" of railroad, canal, and turnpike companies, includes all profits "used for construction." (Sec. 122.)

9 B.—*(Copy.)*

OFFICE OF THE MERCHANTS' INS. CO.,
Boston, May 15th, 1865.

Hon. Joseph J. Lewis,
Commissioner of Internal Revenue, Washington, D. C.:

DEAR SIR: We enclose herewith a copy of a return offered to the assessor of the 3d collection district of Massachusetts, which he does not feel at liberty to accept, and it is now submitted for your consideration, with the following remarks: This company from out its assets distributed, in January last, to its stockholders, the sum of $100,000, paid to it by the Suffolk Bank, as one of its stockholders. This sum was made up of accumulations laid aside by the bank before any act of the United States levying a duty existed. The question whether such fund is chargeable with a duty, to be paid and retained from its stockholders by the bank, has been submitted to the department, and is in controversy. If it shall be determined that the said fund is not a part of the earnings and income of the bank, subject to duty under s. 120 of the act, it would seem to follow that it is not so subject when paid by a corporation holding stock in the bank to its stockholders, and we respectfully ask the department, on this ground, to permit the claim for this duty to stand till the question with the bank is disposed of.

10 But if the bank should be found liable to the said duty, there is a further view in which, it seems to us, the duty cannot be claimed of this company. Assuming it to be due from and paid by the bank, and deducted from the share of this company in its assets, on its final liquidation and conversion into a national bank, it can hardly be true that the sum so assessed is to be again, immediately on its distribution by corporations which have received their portion thereof among their stockholders, subject to a like duty to be again retained and paid to the government. Having paid one duty (in this case within a few days) in the hands of the bank, it would not, in the hands of individual stockholders, be liable to a new duty, but, by the express terms of the act, would be deducted from their dutiable income; and it would be a strange and inequitable construction of the act which should subject it to another tax because received for those exhibited by their trustees, a corporation. Moreover, it appears to us that the proviso at the close of s. 121 makes it clear that the policy of the law is to hold every accumulation of such companies as are named in sections 120, 121, whether laid aside or distributed, subject to one, and but one, duty of 5 per cent. The department are, of course, aware that a large part of all dividends from this company are made from dividends received from

11 banks, on which five per cent. has been paid.

(Signed) THO'S C. SMITH,
President.

C.—(65.)

Return by banks, trust companies, savings institutions, insurance, railroad, canal, and turnpike companies, of dividends declared and paid or payable.—(Sections 120–122.*)*

Account of dividends, in scrip or money, declared due or paid to stockholders, to policy holders, or to depositors, by the managers of the Merchants' Insurance Company, in the city of Boston, in the county of Suffolk, and 3d collection district of the State of Massachusetts, with the amount of tax thereon deducted and withheld from the persons to whom said dividends were paid, and of all undivided profits of the said company, from the first day of October, 1864, to the 31st day of March, 1865, both days inclusive, pursuant to an act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," approved June 30, 1864, except a sum of $115,200 received from the Suffolk Bank in January, 1865, not subject by law to an excise tax, a separate return of which, for the purpose of exhibiting the facts upon which such exemption is claimed, is herewith presented to the assessor, viz:

Capital.	Net gains since prior dividend.	Rate of dividend declared.	Amount of dividend declared.	95 per cent. of dividend, being the whole amount paid to stockholders, &c.	5 per cent. of dividend retained as excise tax.
$500,000 00	$86,404 51	10 per cent. and tax.	$52,631 58	$50,000 00	$2,631 58
Profits over dividend declared, $33,772 93, 5 per cent. of which is					1,688 64
Total excise tax					4,320 22
Or amount taken from surplus fund to complete dividend, on which the tax of three per cent. has once been paid by the company, $, per cent. of which is					.
Total excise tax					4,320 22

(Signed) ——— ———.

I, J. C. Braman, do swear that the above account contains, to the best of my knowledge and belief, a true and faithful statement of all dividends declared due, or paid, by the said insurance company, and of the undivided profits thereof, together with the amount of taxes which have accrued thereon, or should accrue, and not accounted for, during the time, and according to the provisions of the act aforementioned, with the exception above mentioned.

(Signed) ——— ———.

Sworn and subscribed before me, this day of , 186 .

——— ———,

Assistant Assessor.

N. B.—The "undivided profits" of railroad, canal, and turnpike companies includes all profits "used for construction."—(*Sec.* 122.)

12 D.—(65.)

Return by banks, trust companies, savings institutions, insurance, railroad, canal, and turnpike companies, of dividends declared and paid, or payable.—(Sections 120–122.)

Account of a dividend, in money, declared due or paid to stockholders, to policy holders, or to depositors, on the day of January, 1865, by the managers of the Merchants' Insurance Company, in the city of Boston, in the county of Suffolk, and 3d collection district of the State of Massachusetts, of certain undivided profits of the said insurance company, added to their surplus funds, on said day of January, 1865, viz:

Capital.	Extra dividend received from Suffolk Bank.	Rate of dividend declared.	Amount of dividend declared.	95 per cent. of dividend, being the whole amount paid to stockholders, &c.	5 per cent. of dividend retained as excise tax.
$500,000 00	$115,200 00	20 per cent.	$100,000 00	.....	.....
Excess over dividend declared, $15,200, 5 per cent of which is.....					.....
Total excise tax, (see slip annexed).....					.....
Or amount taken from surplus fund to complete dividend, on which the tax of three per cent. has once been paid by the company, $, per cent. of which is.....					.....
Total excise tax.....					.....

(Signed) ——— ———.

I, J. C. Braman, secretary, do swear that the above account contains, to the best of my knowledge and belief, a true and faithful statement of a dividend declared due, or paid by the said insurance company, and of a sum carried to surplus fund, the two together making up the sum received by said company from the Suffolk Bank as aforesaid.

(Signed) ——— ———.

Sworn and subscribed before me, this day of , 186 .

———, ———,

Assistant Assessor.

N. B.—The "undivided profits" of railroad, canal, and turnpike companies include all profits "used for construction."—(*Sec.* 122.)

13 D.—(Continued.)

The above sums, amounting together to said sum of $115,200, were received by the Merchants' Insurance Company from the Suffolk Bank as their portion of an extra dividend to its stockholders, de-

clared under vote of the directors of the latter institution January 3d, 1865. It formed part of a sum of $1,347,363 42, made up as follows:

Dividend of 128 per cent. on capital of $1,000,000	$1,280,000 00
Gov't tax p'd or reserved by bank	67,368 42
	1,347,368 42

This sum was made up in part of the sum of $240,529 21, profits accrued before passage of 1st rev. law of U. S., and in part of the sum of $130,000, profits from the sale of real estate purchased prior to passage of 1st rev. law. And the Merchants' Insurance Company allege and protest that no part of said sum thus received by them from the said Suffolk Bank is subject to the excise tax of the United States, because—

1. Such tax, if payable at all, has been paid, or is payable by the Suffolk Bank, and by no other company or person; and—

2. Because part of said sum, to wit, $370,529 21, made up of the above sums of $240,529 21 and $130,000, is not now, and never has been, in the hands of any person or company, subject to any excise tax of the United States; and they make this return, not by reason of any legal duty so to do, but that the government may be fully informed of the facts.

E.—(*Copy.*)

TREASURY DEPARTMENT,
Office of Internal Revenue, Washington, March 15, 1866.

SIR: In reply to your letter of the 7th inst., relative to tax on an extra dividend declared by the "Merchants' Insurance Company," of Boston, I have to say that said company is clearly liable, under the 120th section revenue laws, for the tax in question. It has heretofore been decided that in determining the amount of tax upon "net gains" of the corporations mentioned in sections 120 and 122, no deductions should be made because a part of the earnings is from the interest upon railroad bonds owned by them, and upon which the tax has been withheld, or on account of tax withheld by other corporations from dividends payable to them. It can, therefore, make no difference to the "Merchants' Insurance Company" whether or not the tax was withheld by the Suffolk Bank from the dividend of profits paid by the Suffolk Bank to the "Merchants' Insurance Company" on the 16th of January, 1865. As regards the taxation of profits acquired before the passage of any internal revenue laws, I have to state that, with the exception of two cases during the latter part of the administration of Commissioner Lewis, it has been the uniform ruling of this office that the tax of five per centum should be withheld from any and all dividends of the corporations mentioned in sections 120 and 122, without regard to the time when the profits were acquired from which said dividends

were made. Commissioner Orton took this ground very decidedly, but at the same time would not disturb the cases settled otherwise by Judge Lewis.

After a careful consideration of the question, I am of the opinion that it is the duty of this office to insist upon the payment of the tax in question, amounting to $57 60; and if the said company still refuses to pay the tax, you will proceed to enforce the collection of the same, together with penalties, &c., as provided by law. Your "estimate" of the tax was duly received, but it is not in accordance with the provisions of the law. Section 120 provides as fol-
16 lows: "And in case of any default in making or rendering said list or return, or of any default in the payment of the duty as required, or any part thereof, the assessment and collection of the duty and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal."

You will perceive that the proceeding should not be by "estimate," as upon failure to return tax on capital, circulation, and deposits, but that you should make an assessment, as in other cases of neglect and refusal.

The papers are herewith returned, and you will dispose of the case in accordance with the foregoing.

Very respectfully,

(Signed) D. C. WHITMAN,
Acting Commissioner.

JAMES RITCHIE, Esq.,
U. S. Assessor, 3d Dist. Mass., Boston, Mass.

The cause was thence continued to the May term, A. D. 1866, when on the fifth day of June the following demurrers were filed, viz:

The demurrer of James Ritchie, one of the defendants to the bill of complaint of the Merchants' Insurance Company.

17 Circuit court, June 5th, 1866.

UNITED STATES OF AMERICA, *Massachusetts District, ss:*

THE MERCHANTS' INSURANCE COMPANY }
vs.
JAMES RITCHIE and EDWARD L. PIERCE. }

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth, doth demur thereto, and for cause of demurrer showeth that the said complainants have not in and by their said bill made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for from or against this defendant, or to any relief from this court as a court of equity. Wherefore this defendant demands the judgment of this honorable court, whether he

shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and
18 prays to be hence dismissed with his reasonable costs in this behalf sustained.

JAMES RITCHIE, *Assessor.*
By H. C. YOUNG, *Ass't Ass'r.*

I, H. C. Young, for James Ritchie, the defendant, on oath say that the above demurrer is not interposed for delay.

H. C. YOUNG, for
JAMES RITCHIE.

I, W. A. Field, one of the counsel for the respondents, hereby certify that in my opinion this demurrer is well founded in point of law.

W. A. FIELD.

JUNE 5TH, 1866.

U. S. OF A., *Mass. Dist.:*

Subscribed and sworn to by H. C. Young, before me—
JOHN G. STETSON,
Clerk Court pro tem.

19 *The demurrer of Edward L. Pierce, one of the defendants to the bill of complaint of the Merchants' Insurance Company.*

Circuit court, June 5th, 1866.

UNITED STATES OF AMERICA, *Massachusetts District, ss.:*

THE MERCHANTS' INSURANCE COMPANY
vs.
JAMES RITCHIE and EDWARD L. PIERCE.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth, doth demur thereto, and for cause of demurrer showeth that the said complainants have not in and by their said bill made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for, from or against this defendant, or to any relief from this court as a court of equity. Wherefore this defendant demands the judgment of this honorable court, whether he should be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

EDWARD L. PIERCE.

I, Edward L. Pierce, the defendant, on oath say that the above demurrer is not interposed for delay.

EDWARD L. PIERCE.

20 I, W. A. Field, one of the counsel for the respondent, hereby certify that in my opinion this demurrer is well founded in point of law.

W. A. FIELD.

JUNE 5TH, 1866.

U. S. A., *Mass. Dist., ss:*

Personally appeared Edward L. Pierce, above named, and made oath that the above statements by him subscribed are true.

Before me—

JOHN G. STETSON,
Clerk pro tem. U. S. C. C.

And now, after mature deliberation thereon had, it is ordered, adjudged, and decreed by the court that the pl'ff's said bill of complaint be, and the same is hereby, dismissed with costs, taxed at . Whereupon the said plaintiff then and there claimed an appeal to the Supreme Court of the United States, to be holden at Washington on the first Monday of December next, and gave good and sufficient security to prosecute the said appeal with effect, and to answer all damages and costs if he shall fail to make good his appeal, which security was approved by the court, and the said appeal was allowed accordingly.

21 A true record.

Attest: EDWIN T. NASH, *Clerk pro tem.*

UNITED STATES OF AMERICA, *Massachusetts District, ss:*

I, Edwin T. Nash, clerk pro tem. of the circuit court of the United States for the first circuit, Massachusetts district, do hereby certify that the foregoing is a true copy of the record, and of all proceedings in the cause of the Merchants' Insurance Company, plaintiff, and James Ritchie *et al.*, in this court determined.

In testimony whereof I have hereunto subscribed my name and affix the seal of said court at Boston, in said district, this twenty-fifth day of October, A. D. 1866, and of the independence of the United States the ninety-first.

[SEAL.] EDWIN T. NASH, *Clerk pro tem.*

22 Know all men by these presents, that we, the Merchants' Insurance Company of Boston, in the district of Massachusetts, as principal, and F. Gray and S. Torrey, both of said Boston, as sureties, are holden and stand firmly bound and obliged unto James and Ritchie Edward L. Pierce, both of said Boston, in the full and just sum of two hundred dollars, to be paid unto the said James Ritchie and Edward L. Pierce, and their respective successors in the office of assessor and collector, third collection district, Commonwealth of Massachusetts; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these

presents. Sealed with our seals, dated the twenty-seventh day of November, in the year of our Lord one thousand eight hundred and sixty-six.

The condition of this obligation is such, that whereas, lately, at a circuit court of the United States, holden at Boston, in and for the district of Massachusetts, on the fifteenth day of October, ult., in a suit in equity, depending in said court between the said Merchants' Insurance Company, as complainant, and said Ritchie and Pierce, defendants, a decree or judgment was *was* entered in the words following: Demurrer sustained; bill of complaint dismissed with costs, and the said Merchants' Insurance Company has in due form of law taken an appeal from the said decree or judgment to the Suprome Court of the United States, for the purpose of reversing the said decree.

Now, if the said Merchants' Insurance Company shall prosecute the said appeal to effect, and answer all damages and costs if they fail to make good their said appeal, then the above obligation to be void; else to remain in full force and virtue.

Merchants Ins. Co., by—

[L. S.] THEO. C. SMITH, *President.*
[L. S.] F. GRAY.
[L. S.] S. TORREY.

Witness to signatures—
J. C. BRAMAN.
G. W. PEARCE.

Approved. NATHAN CLIFFORD,
Asso. Jus. Sup. Court U. S.

Nov. 28th, 1866, sureties sufficient.
W. A. FIELD, *Ass't U. S. Att'y.*

Filed 3 Dec'r, 1866.

[No. 337.]

Supreme Court of the United States.

December Term, 1866.

THE MERCHANTS' INSURANCE COMPANY, APPELLANTS,

vs.

RITCHIE.

BRIEF FOR APPELLANTS.

The Bill, filed April 23d, 1866, against the Defendants, Assessor and Collector of Internal Revenue, avers that the Defendant Ritchie, as Assessor, had assessed upon the Appellants, pursuant to instructions from Commissioner of Internal Revenue, a tax upon a certain sum received by the Appellants as a dividend from the Suffolk Bank, a Corporation in which Appellants were stockholders, which dividend, the Bill avers, had already been subjected to the same tax against the Suffolk Bank, at the time said dividend was by it declared, and which was also made up in part of profits accumulated before the existence of any Internal Revenue Law of the United States, and in part of sums realized by said Bank from the sale of real estate purchased before the existence of any Internal Revenue Law of the United States. The Bill avers the issue of a warrant by defendant Ritchie, Assessor, to defendant Pierce, Collector, and a threat of distraint by the latter upon property of the Appellants, and prays for an injunction against both Defendants, to restrain them from proceeding to seize and sell the property of the Appellants.

To this Bill, Defendants file a general demurrer.

In the view of the Appellants, this cause must be disposed of by the determination of one or more of the following questions, and such disposition will be largely influenced by a sound and just application of two principles of public policy. The

one, that Government ought not to be embarrassed in the prompt collection of its revenues, except for strong and controlling reasons; the other, that the citizen ought not to be precluded either from all remedy, or from adequate remedy, against clearly established illegal proceedings of the Government in the assessment and collection of those revenues. The questions are as follows:—

1st. Does the Act of 1833, chap. 57, sect. 2, confer upon the Courts of the United States general jurisdiction in all cases arising under its internal revenue laws, for which other provisions are not already made by the Statutes of the United States, and which would, upon settled principles, be cognizable in Equity? And further, does not the same section, by necessary implication, provide that where property is taken or distrained illegally, but in professed execution of those laws, a party injured may, by Bill in Equity, apply to the Courts of the United States for the precise remedy sought in this case?

2d. If the 2d section of the Act of 1833 does not, by just construction, provide this precise remedy for the redress of illegal taxation, nevertheless, will not a Court of Equity, under the principles which govern its jurisprudence, afford the injured party relief by injunction, where, by reason of the mistaken legislation of the United States, the injured party has been deprived of the redress which the law would otherwise afford?

3d. If it shall be determined that, by reason of such legislation, or otherwise, the injured party cannot be said to have been deprived of all redress, nevertheless, looking to the inadequacy of all other remedies, and to the consequences which must flow from a distraint and sale, and its tendency to produce numerous suits to determine the same principle, is not the case presented one in which a Court of Equity, upon its established doctrines, will interfere by injunction?

I.

And first, as to the Statute of 1833, section 2, Appellants suppose it to be indisputable, that by the first part of that section general equity jurisdiction is conferred on the Courts of

the United States (except where other statute provision has been made), in all cases arising under the internal revenue laws.

A subsequent portion of the same section contains this provision: "*And all property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed in the custody of the law, and subject only to the orders and decrees of the Courts of the United States having jurisdiction thereof.*"

This provision is to be construed, by reason of the 50th section of the Act of June 30, 1864, precisely as if it had been incorporated in that Act.

Upon familiar principles, every part of it must be taken and construed as applicable to proceedings under the internal revenue law, and no portion of it can be rejected upon the suggestion that it is better adapted to the collection of maritime revenue, for which it was originally framed, unless such part be wholly senseless as applied to the internal revenue law. It may be added, that Courts are extremely cautious in assuming any other principle of construction than one which gives effect to every word and sentence of a statute.

The provision divides itself into two parts. 1st. That all property taken or detained, &c., shall be irrepleviable. 2d. That such property "*shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the Courts of the United States having jurisdiction thereof.*"

Under this last clause there can be no question, we submit:

1st. That property taken or distrained by a collector, under the internal revenue law, and while in his possession, is embraced by its provisions.

2d. That while thus in his possession, it is subject only to the orders and decrees of the Courts of the United States having jurisdiction thereof.

3d. That the only mode of subjecting the property "to the orders and decrees of the Court," is by some suit to be instituted between party and party. The Collector, having the property in his possession, can institute no suit; the owner of the property must needs be the party Plaintiff, and the Collector the party Defendant.

4th. Since such a suit, by the terms of the Act, can only be brought to obtain a legal disposition of the property seized, and since the earlier part of the section has given the Court full equity jurisdiction, and as the mode of disposing of the property is stated by the Act to be "*the orders and decrees* of the Courts of the United States" (terms applicable usually to equity proceedings), it is submitted, that the only suit that can be brought is a Bill in Equity, and that the Bill must be in the form of an injunction Bill, since the only decree that can be entered in it must be one directing the disposition of the property.

Appellants therefore submit, that, unless by some unknown rule of construction this Statute shall be found by the Court to be applicable only to the collection of maritime revenue, and this in face of the 50th section of the Act of 1864 declaring that it shall be applicable to the collection of internal revenues, it has been shown that the precise remedy, in the precise form in which this suit proceeds, has been expressly provided by the Act of 1833.

II.

It is no answer to the view appellants take of this statute that no case has been found in which the remedy it provides has been attempted to be enforced.

The original Act was passed to meet a particular condition of things in some of the Southern States, and had reference solely to the collection of maritime revenue, — for illegal assessments in the collection of which an established method of redress existed. Six years afterwards this established remedy, and all remedy, was taken away by the statute 1839, chapter 82, and was not restored until the Act of 26 February, 1845 (5th stat, 727). Indeed, that statute is not a restoration, but the establishment of a new system, coupled with conditions under which a remedy was provided for the wrong, and thus any resort to the statute of 1833 was taken away.

Cary *vs.* Curtis, 3 Howard, 236.
Curtis, Admin'r, *vs.* Fiedler, 2 Black, 461.

Nor let it be said that the 50th section of the Act of 1864, incorporating the Act of 1833 into its provisions, must be deemed by construction to also incorporate the Act of 1845,

chapter 22, and thus furnish a remedy for the appellants. With both statutes before them it would be strange indeed to hold that such was the legislative intent.

III.

It may be answered that if appellants' view of the effect of the statute of 1833 is correct, yet the present case shows no actual seizure under the warrant of distraint; but it is submitted that, under the general equity jurisdiction given by the Act of 1833, and upon a bill which sets forth, under oath, the issuing of a warrant and a threat of distraint, a court of equity will not wait until such actual distraint is made, (and which they are authorized by the statute to enjoin,) but will at once use its preventive powers upon a case which shall show clearly that it must enjoin the distraint if made.

IV.

If the appellants are wrong as to the construction and effect of the Act of 1833, the next question is, Whether, upon the law and facts disclosed by the bill, if it be shown that appellants are without remedy except by such bill, have the Court the power to afford them redress in this form, — and is the case a fit one for the exercise of the power? Upon this point the appellants submit, that there was no statute provision of the the United States "already made by law," when this bill was brought, which would oust this court of jurisdiction by reason of the exception in section 2d of Act of 1833. The only suggestions that can be made by the defendants are, —

First, That sections 19 and 44 of the Act of 1864 provide for an appeal to the Commissioner of Internal Revenue, and that this remedy must be exhausted before any suit could lie; or perhaps it may be urged that the decision of the Commisioner is a final judgment, and forever bars the appellants of all remedy. To this we reply, —

a. That the appeal contemplated by s. 19 is confined to a revision by the Assessor of his own doings or the doings of his assistant assessors, and this merely in relation to the annual lists, which does not embrace this case.

b. That the appeal to the Commissioner of Internal Revenue, contemplated by sect. 44, has already, in substance, been made and overruled, as appears from the correspondence between the appellants and the Office of Internal Revenue, copies of which are to be found in the "Transcript of Record," pp. 5–8. That remedy is therefore exhausted; so that, unless the refusal of the Commissioner to redress the wrong, in the face of two decisions of his predecessor, is conclusive upon us, the fact of the appeal, the right to appeal, or the result of the appeal, is no objection to the present bill.

c. But this very question as to the necessity of appeal has been settled by this Court, in a case where provision was made by the law of California for setting aside the doings of assessors, and the objection taken that no suit could be maintained, but that the "party should have pursued his remedy to set it aside according to the provisions of that law." The judgment of this Court disposed of the objection thus: — "We do not think so. The assessment was not a judicial but a ministerial act; and, as the assessors exceeded their powers in making it, the officer is not protected." (Hays *vs.* Pacific Mail Steamship Co., 17 How., pp. 596, 600.)

d. If it is urged by the defendants that, by analogy to a class of cases in some of the States which decide that where provision is made by law for an appeal to county commissioners, &c., for an abatement of a tax upon the ground of excess or over-valuation (for such the cases will be found to be), the decision of such county commissioners is final, and so the decision of the commissioner in this case ought to be held to be final, we answer that this suggestion loses sight entirely of the point that the appeal in those cases is made not upon the question of the illegality of the tax, but upon its being just and proportionate, — that is to say, warranted by the facts. The whole question raised by the appeal in those cases is a mere question of *quantum* or fact, and not of law, and the decision of the commissioners may well be held conclusive. And the same remark is true of the principles settled by the cases cited from 16 How., 24 How., 1 Wallace — as to the conclusiveness of the valuations by appraisers of imported merchandise. The only question is, how much? They involve a mere question of fact as to value, and not a

question whether the subject matter can legally be subjected to duties; and there is no question of the excess of authority involved in them.

c. It is to be carefully noted that section 9 of the Act of 1866, which is, upon the question of appeal, a substitute for the provisions of section 44 of the Act of 1864, and which provides a new system, has no application to this cause, which was commenced before its passage.

Second, The defendants may further suggest that this same section 44 of the Act of 1864 recognizes the liability of both collectors and assessors, by providing indemnity against judgments that may be recovered against them respectively, "*in any Court*," for "moneys *wrongfully collected*" by any collector, and all damages and costs recovered against any assessor by reason of anything done "in the *due performance* of their official duties."

It may be well doubted whether, as to collectors, the words "wrongfully collected" do not merely intend a wrongful abuse of the powers given them by their warrant, since any wrong in the assessment must needs be that of the assessor. And as to the assessor, an illegal assessment can hardly be said to be an act done in the "due performance" of his duty. But be this as it may, we submit —

a. That this provision was probably inserted as precaution, lest in some of the States, and in some form, judgments might be obtained against the collector or assessor. The words "any Court," indicate State Courts, since provision is made by the Internal Revenue Act for the trial of all causes that may arise under it, either primarily or by removal, in the Courts of the United States. Possibly, by neglect of removal, such judgments may from time to time be obtained.

b. It can hardly be alleged that section 44 of itself distinctly provides that a remedy shall be had for wrongful and illegal taxation against assessors and collectors. If, therefore, it shall be clear that by the law, as it stood when the Act of 1864 was passed, no legal remedy against either of those officers, for such illegal taxation, existed, and especially if it shall be shown that, by subsequent legislation, a provision has been made which must necessarily defeat all such rights of action, then the con-

struction we have given as above, to section 44, will be deemed the reasonable one. We proceed, then, to discuss the question whether any such remedy existed at the time this action was brought.

V.

It must be conceded, we think, that if any liability exists on the part of the Collector, it must be enforced, either (1) by an action of trespass, or (2) by an action for money had and received, after payment upon protest, or (3) by an action for money had and received against him for the proceeds of the sale under distraint. We submit, —

1. That it is too clearly established to be questioned, that the Collector, acting under a warrant legal in form, and emanating from an authority which has jurisdiction to issue it, is subject to no action of tort for the regular execution of his precept. This proposition rests upon universally recognized principles of law, and may also be found in the adjudged cases of various of the States. We quote the following full statement of this principle from a Massachusetts authority, both because of its distinctness, and because it states the doctrine of the respective liabilities of the Collector and Assessor, and the grounds on which they rest, with great clearness: —

"Generally, executive officers are not liable to actions for the regular execution of precepts apparently lawful, and which come from an authority which has jurisdiction over the subject. But we cannot view assessors in this light. *They are not compellable to assess an illegal tax. They may exercise their judgment on the subjects for which the money appears to be voted, and they may refuse to cause the collection to be enforced if they deem the tax illegal.* If they are not liable to an action for causing an arrest, or the seizure of property, for the non-payment of an illegal tax, it is difficult to find any remedy for an injured citizen in cases of this nature. *The constable or collector is not answerable, because he acts in obedience to a warrant under the hands and seals of the assessors, who have jurisdiction over the subject, and authority to assess a tax and to issue their warrant, and it would be dangerous to vest such officers with a right to question the legality of the proceedings which*

precede the assessment. If an action would lie against the town, it could only be for the money actually received into the treasury, which in most cases of distress *would be but a partial remedy.*" (Stetson *vs.* Kempton, 13 Mass. pp. 272, 282.)

This doctrine as to collectors has been held down to the latest decisions in Massachusetts (Hays *vs.* Drake, 6 Gray, pp. 387–9. Eames *vs.* Johnson, 4 Allen, pp. 382–4. See, also, 1 Kernan, 563, and cases cited.)

2. We admit that, by the principles of the common law, and under numerous decisions of this and other courts, payment of an illegal tax to a collector under a warrant, with threatened distraint, and under protest, might have been recovered back by an action for money had and received; but in this case the right had been taken away by legislation when this suit was brought. By the 3d section of the Act of March 3, 1865 (XIII. St. 483), it was made the duty of the collector to pay "*daily into the the treasury, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description whatsoever,*" the gross amount of all duties, taxes, and revenues received or collected by him. The case of Cary *vs.* Curtis, 3 How, 242, settled that a similar provision in the Act of 1839, chap. 82, sect. 2, took away all remedy against the collector for money paid under protest; and thus, it would seem, conclusively settled that money had and received for sums paid under protest would not lie against the collector in this case. It has been suggested that this Act of March 3, 1865, ought to be deemed to embrace the provisions of the Act of 1845, ch. 22, which was passed to heal the difficulty occasioned by the Act of 1839, which was the subject of discussion in Cary *vs.* Curtis. But it is not easy to perceive upon what principle of interpretation such a suggestion rests. Congress, by the Act of 1839, compelled the collectors of maritime duties to pay over all moneys in their hands. This, the Court determined, took away all right to recover against the collector for money had and received. By the Act of 1845, Congress restored the remedy, with modifications. By the Act of March 3, 1865, on which we rely in this case, Congress, in full view of their previous legislation, reënacted, for the purposes of Internal Revenue, substantially the Act of 1839; and omitted, we submit,

intentionally, to insert the provisions of the Act of 1845, for the purpose of cutting off any remedy, by money had and received, against the Collectors of Internal Revenue. We again add that the Act of 1866, sect. 9, does not touch this case, which was brought before its passage.

As to any action for money had and received against the collector, after distraint and sale, for the proceeds, it is taken away upon the same principles stated above. Besides, as stated in Stetson *vs.* Kempton *(ubi sup.)*, such a remedy would be wholly inadequate.

VI.

We proceed next to consider the question whether the assessor can be liable in any form.

1st. We admit that, but for the legislation of Congress, the assessor would be liable in tort for the assessment of an illegal tax. But this rests solely on the doctrine stated in Stetson and Kempton, above quoted (13 Mass. 282), viz.: that "they are not compellable to assess an illegal tax. They may exercise their judgment on the subject,"—and by this Court, in Hays *vs.* Pacific Mail Steamship Co. (17 How. 600), where the ground was taken by defendant that the act of the assessors was a judicial act, and that by reason thereof money paid to the collector under protest could not be recovered back. To which the Court reply: "The assessment was not a judicial, but a ministeral act, and as the assessors exceeded their powers, the officer (collector) is not protected"

2. But, as this liability is thus shown to arise solely from the fact that the assessor may exercise his judgment, and if he "exceed his powers," is liable,—if that right of judgment is taken away by statute, and he has no authority except to execute the directions of a superior, the principle upon which the liability rests fails, and it would be monstrous to hold him responsible.

Now, by the 1st and 12th sections of the Act of 1864, provision is made for the preparation by the commissioner of Internal Revenue of all the instructions, &c., needed for the purpose of collecting internal duties, and these instructions, &c., it is enacted, "shall be binding on each assessor and his assistants," and

accordingly in this case, as disclosed by the exhibits annexed to the bill, the illegal assessment of which we complain has been made, not by the assessor, but by the instructions of the commissioner.

8. It is needless to say that, upon settled principles, the action for money had and received cannot lie against the assessor. No money ever comes to his hands in the collection of duties.

We submit, then, that it is clear, under the legislation of Congress, that all remedy in any form, against either collector or assessor, is taken away.

VII.

But if it shall be determined that, under the Act of 1833 the precise remedy which we seek is not provided, and if it shall be further determined that all remedy against the assessor or collector has not been taken away by legislation, we desire next to discuss the question, Whether, if suit will lie against either the assessor or collector, at law, yet is that remedy an adequate one, and are we not entitled to maintain this bill upon the general principles of Equity jurisprudence?

1. It has been said that frequent attempts have been made in various State courts to enjoin a tax or revenue officer from collecting a tax illegally assessed, and that in many instances the court have refused the injunction: that in England, and in several of the States, no such process has ever been brought;—from which the inference is made that the jurisdiction was supposed not to exist. The appellants believe it to be true, as is shown by the subjoined cases, that in the courts of some of the States this remedy has been sought and applied. (See cases cited in Wilson *vs.* Mayor of New York, 4 ed. Smith, 706.)

In other cases, in the State Courts, undoubtedly, the Court has declined to exercise the power. Each case must be carefully examined, and collated with the local law, to determine how far the denial of jurisdiction was placed upon the ground *that the party had a plain and adequate remedy at law*, under local legislation or otherwise, and also how far full equity jurisdiction existed in those respective States.

The absence of any such case in Massachusetts may be accounted for, if necessary, by the fact that her Courts had not, general equity jurisdiction till 1857.— (Ch. 214, Acts of 1857, Mass.)

2. It has been further suggested that, in several cases in the Circuit Courts of the United States, for New York, New Jersey, and Pennsylvania, this remedy has been sought and denied. The appellants have had no opportunity to examine such cases, but they are instructed and believe that Bills have been maintained, under circumstances similar to those of this case, in various cases by Mr. Justice Nelson, in the Circuit Court of New York, and by Mr. Justice Davis and his associate Justice for the Northern District of Illinois.— (See Mechanics and Farmers Bank *vs.* Townsend, Albany, N.Y., April 29, 1866, and Chicago, Burlington and Quincy Railroad *vs.* Page et al., U. S. Circuit Court, Northern District of Illinois.)

Nor is the fact that no such remedy has been sought against the collector of maritime customs, of any great weight in the discussion. Except during the interval between the Act of 1839 and the Act of 1845, there has been no occasion for seeking redress in this form. There has always existed, up to 1839, by the common law, and after 1845, by the statute law, a plain and adequate remedy.

3. The further suggestion has been made, that not only is there no well considered case in which, under similar circumstances, the relief we seek has been granted, but that it is not in the power of any Court to restrain a public officer of the Government from doing an act in the line and within the exercise of the duties confided to him by law. That if the assessor had jurisdiction of the parties and of the subject-matter, his decision is conclusive, and the assessment cannot be held void. The result of this would be that, as against residents within the district of the assessor, he would of course have jurisdiction, and as the subject-matter upon which he has jurisdiction is taxation, his jurisdiction over that subject is clear, and thus, any tax, though completely illegal, made by such assessor against a party thus resident is not void, nor open to inquiry in any Court of law or equity. This doctrine, if sound, reaches far beyond the question as to the mode of interference

by Courts. Its principle is that the decision of an assessor is final, and can be revised in no form whatever by any tribunal. Whether this doctrine be sound or not, as applied to quasi judicial bodies, to which the cases cited in support of it refer, is immaterial. The unbroken current of authority establishes that an assessor does not fall within any such principle, and this Court, in the case of Hays against the Pacific Mail Steamship Co., cited above, have settled that an assessor is a mere ministerial officer, and that his assessment of an illegal tax is an excess of power involving responsibility to those who suffer by it.

4. That this question, as to the power of the Court to interfere by injunction in such case, has been decisively settled in two cases where perpetual injunctions have been ordered against the collector who has attempted to enforce an illegal tax levied by an assessor, thus asserting the jurisdiction, and leaving open only the question whether a fit case has been made, within the principle of those decisions, for the exercise of the power. These cases are:—

Osborn *vs.* U. S. Bank, 9 Wheaton, 816.
Dodge *vs.* Woolsey, 18 Howard, 331.

The first of these cases was an attempt by an assessor of the State of Ohio, entitled an auditor, to assess and collect upon and from the Bank of the United States an annual tax authorized by an Act of the Legislature. The tax was held by this Court to be illegal, and its collection perpetually enjoined. Of course the embarrassment to the State of Ohio, arising from an injunction against the collector of its revenues, and the policy of the law in that regard, were obvious to the Court, and perhaps there is no case in which the Court exercises jurisdiction so unwillingly as one in which the rights and interests of a State are involved. But the Court say:—"*It will not be pretended that, in such a case, an action at law could not be maintained. But in this and many other cases of continuing injuries, as in the case of repeated ejectments, a Court of Chancery will interpose. The single act of levying the tax in the first instance is the cause of an action at law. But that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition.*"

The present case is clearly within the principle thus established. The appellants, as shown by the Bill, are the owners of stock in another corporation, whose dividends, at stated intervals, are constantly recurring. The right claimed by the assessor to tax these recurring dividends will be asserted, under the instructions from the Commissioner, as often as those dividends are declared, so that this case is, in all particulars, within the principle asserted above, except perhaps the comparative magnitude of the taxation, which may or may not tend to destroy the corporation. It may be added that the principle involved in this cause affects all corporations whose capital is invested in the stock of other dividend-paying Companies, and the exercise by the Court of its jurisdiction in this cause will prevent an infinite multiplicity of suits, although perhaps this latter fact may not bring the case within the principle upon which the Court exercises jurisdiction to prevent such an occurrence.

The second of the cases above cited (Dodge *vs.* Woolsey) was one in which no conflict existed between the rights of the United States and those of one of the States. It was a bill brought by a stockholder of an Ohio bank (alleging that the directors of that bank refused to resist an illegal tax) against a tax-collector, and the directors (by reason of their refusal), to enjoin the collection of a tax assessed under the laws of Ohio upon the bank, on the ground that such tax was illegal, by reason of a contract between the bank and the State. The same question of public policy as to the embarrassment of a State in the collection of its taxes was raised, and the same theory was set up,—that the assessment was made by an assessor in conformity to the law of the State. (See points 7 and 9 of appellant, p. 332, and the judgment of the Court thereon, p. 358.) A perpetual injunction was decreed by the Court. In this case the tax was but 9 per cent upon the capital of the bank (see statement by counsel of appellee, p. 334), and this was the only irreparable mischief shown, except that the tax was constantly recurring every year. Unless this Court can know that the pressure of the tax imposed in this case will not, looking to the financial position of the appellants, have as large an influence upon their capacity to continue in existence as the 9 per cent upon the capital of the Ohio Bank would have, the two cases cannot be distinguished.

An attempt has been made to distinguish these cases, upon the ground that they were proceedings to restrain the exercise, by assessors and collectors, of their powers under State laws, which laws were in violation of the constitution of the United States (as had already been decided), and so void and incapable of affording protection to those acting under them.

It is not easy to perceive how, in principle, a violation of the fundamental law (the Constitution) can be distinguished from the violation of any other law. The present Bill can only be maintained upon the ground that the acts of the assessor and collector are in violation of law. The jurisdiction enabling the Court to interpose is not affected by the fact that the principle upon which such interposition is sought has been adjudicated. This fact has no value except as an aid to the Court in determining the question of legality; *nor can any valid distinction be made as to the jurisdiction of the Court and the fitness of its exercise in cases where the law under which the assessor and collector act has been declared invalid, from cases where, though the laws be valid, the application of them by the assessor and collector is wholly invalid.*

It is submitted then that these cases teach —

a. That jurisdiction in equity exists in the Courts of the the United States to perpetually enjoin collectors or assessors in any of the States who may act under a law which the Court shall find to be unconstitutional or illegal, upon any ground whatsoever, and this, notwithstanding the policy of the law requires care to be used lest the Government be embarrassed and public credit shaken. Further, that this jurisdiction will be exercised in cases affecting the rights of the several States, which has always been held by this Court to be a power to be most cautiously exercised.

b. That this jurisdiction cannot, upon principle, be affected by any supposed distinction between its application to a case where the law under which the assessor or collector acts is found by the Court to be illegal and void, and a case in which, though the law be legal, it has been illegally wrested by the assessor or collector, and the property of the citizen, seized or threatened to be seized, in carrying into effect such illegal abuse of the law.

VIII.

Having regard to the constant recurrence of the attempt by the assessor to exercise this illegal power, to the multiplication of suits that must ensue, and to the fact, if we are right in our previous proposition, that appellants have no remedy, adequate or otherwise, except by injunction, it is submitted that the complainant is entitled to the decree he seeks.

The suggesion that the existence and exercise of this jurisdiction may multiply questions for the decision of the Court, and embarrass the Government, might be weighty upon a question of expediency; but if, as has been argued, the Government, by its legislation, has cut off all redress from the citizen for wrongs suffered in the execution of its laws, or if no clear and adequate remedy exists for such wrong, the exercise of the jurisdiction will, in the one case, lead to a change in those laws, and, in the other case, the highest policy is to protect the citizen against injuries, even from the Government, for which he has no adequate redress. It may be added that the power of the Court to mould its relief and impose condition by which the Government may be made secure, in case of injunctions, is clear and ample.

IX.

If appellants shall be found by the Court to be entitled to an injunction upon a proper case made, it is necessary for them to show what that case is, as stated by the Bill and confessed by the Demurrer.

1. The sum upon which the officers of Internal Revenue claim to assess and collect the tax in question, was received from the Suffolk Bank by the Appellants as a dividend declared by the bank to which they were entitled as stockholders therein. The tax of five per cent. on this dividend was payable by the bank.

2. The duty of five per centum is, by section 120, laid upon all dividends thereafter declared due, whenever the same shall be "*payable to stockholders.*" In section 117, the provision that "there shall also be deducted the income derived from dividends on shares in the capital stock of any bank, &c., which shall have already been assessed, &c.," applies to the "stockholders" referred to in section 120, which lays the tax,

whether such stockholders be corporations or individuals. And although the word "person" is used in the early part of section 117, yet it is to be construed to have the same meaning as "stockholders" in section 120. To hold otherwise would lead to singular discrimination between dividends receivable by an individual and dividends receivable by a corporation, and subject the stockholders of the latter to an assessment of ten per cent. upon such dividends, instead of five as prescribed by the act. When it is considered that the corporation is the mere trustee or agent of the stockholders, the injustice of a double assessment, merely because the stockholder receives his dividend through such agency, is manifest. Such was the judgment of Mr. Commissioner Lewis, as shown by the Exhibit annexed to the Bill. Record, p. 8.

3. But if the word "person" in section 117, does not mean the same as "stockholders" in section 120, and thus embrace corporations who are stockholders, then we say that the stockholders of the appellant company are within the very words of the early part of section 117, and are entitled to be exempted from double taxation, and that this cannot be accomplished except by holding their agents, the appellants, free from double taxation.

4. Appellants further submit, that the last paragraph of section 121 in terms protects appellants against the imposition of this tax. That paragraph commences with the word "*provided*"; but, inasmuch as it is found at the close of a section which, up to that point, applies only to banks, and which not only does not expressly contemplate the making of any dividend, but is framed to meet the case of a bank which *does not* make a dividend, it is clear that it must be construed to be so far general as to apply to section 120 as well as to section 121, and that it would more properly be headed, "*And be it further enacted*," and should be read as if it stood as follows: —

"And be it further enacted, that when any dividend is made (by a bank, trust company, savings institution, insurance or railroad company) which includes any part of the surplus or contingent fund of any bank, trust company, savings institution, insurance or railroad company, which has been assessed and the duty paid thereon, the amount of duty so paid on that

portion of the surplus or contingent fund may be deducted from the duty on such dividend."

It cannot mean "when any dividend is made *by a bank only*, which includes, &c.," for that would be a discrimination in favor of banks and against the other companies named, such as no Court would willingly admit in construing a statute.

If the intention had been to exempt from further duty dividends made by banks and other companies, so far as they included any part of the surplus, &c., *of the particular bank or other company* making the dividend, which had been assessed *in the hands of the bank or other company*, the language used would have been, "any part of the surplus . . . . of *the* bank . . . . . ", instead of "any part of the surplus . . . . of *any* bank . . . ."

5. The record shows that this dividend of the Suffolk Bank, which has been made liable to duty of five per cent. at the time it was declared by that Bank, and is now again sought to be retaxed as against the appellants, was made up in part of profits realized and laid aside before the passage of any internal revenue law of the United States. Had these profits been made by an individual, and laid aside by him, we submit, that there could be no question that they could not in any form be subjected to internal revenue taxation, and we submit, that the fact of the distribution of such profits by a corporation (which is a mere trustee for individuals), having been made after the passage of an internal revenue act, ought not to create a liability, since otherwise all citizens not holding stock in corporations will enjoy an immunity not shared in by those who do.

6. Another part of the dividend so made by the Suffolk Bank consists of profits on sales of real estate purchased before the existence of any Internal Revenue Law of the United States, and consequently not "*within the year*" during which this assessment was made. The proviso, at close of sect. 116, limits the taxable profits upon sales of real estate to profits on purchases of real estate "within the year."

And appellants submit that the profits realized and laid aside before the passage of any Internal Revenue Law of the United States, and the profits from sales of real estate purchased before

the passage of any Internal Revenue Law of the United States, are not now, and never have been, in the hands of any person or company, subject to duty under the Internal Revenue Laws of the United States.

S. BARTLETT,
F. W. PALFREY, } *for Appellants.*

In the Supreme Court of the United States.

DECEMBER TERM, 1866.

THE MERCHANTS' INSURANCE COMPANY, appellants, *vs.* JAMES RITCHIE. } No. 337.

THE CASE.

This is an appeal from a judgment of the circuit court of the United States for the district of Massachusetts, dismissing a bill in equity, filed by the appellants April 23, 1866, against the assessor and collector of the 3d collection district of Massachusetts, praying that the defendants might be enjoined from the distraint and sale of the complainant's property in the collection of a tax assessed and levied upon an extra dividend of $100,000, paid in January, 1865, by the company complainants to their stockholders, being part of a certain sum received by the company as one of the stockholders in the Suffolk Bank. The complainants averred that the assessment of such tax was wholly illegal and void, and that the collection of the same would be without lawful authority. The defendants demurred, for the reason that the bill disclosed no ground for equitable relief. The demurrer was sustained, and the bill dismissed with costs.

ARGUMENT.

First Point.

The company has a plain, adequate, and complete remedy at law.

1. *It may avert the threatened injury to its property by paying the assessed tax, and then, if it place itself in the position to show that the payment was not voluntary—as by making protest against the exaction at the time of payment—its right to recover the money, if the tax is illegal, is clear, under the common law and the internal revenue statutes of* 1864, 1865, *and* 1866.

This proposition involves the consideration of two questions: 1st, whether, assuming that the obligation imposed by section 3 of the act of March 3, 1865, on every collector to pay all moneys into the treasury does not defeat the right of a party so situated to maintain an action at law against the collector, such an action may be maintained according to the jurisprudence of the common law? 2d, whether section 3 of the act of 1865 has the effect of destroying the right of recovery in such a case as this, after payment of the money under protest?

(1.) On the first question we remark, that no well-founded distinction can be drawn between the liabilities of collectors of internal revenue and those of collectors of customs, under our foreign revenue system, based upon the difference in the machinery organized by Congress for the assessment and collection of taxes or duties levied under the respective systems of laws. According to the foreign customs acts, the collectors are both assessing and collecting officers. Under the

excise laws the functions of assessing and collecting are distributed between two separate officers.

Now, this court has adjudicated the point, that the legal liability of a collector, under such an arrangement of the system for the collection of taxes, is not affected by his relations to the assessor.

In the case of *Hays* vs. *The Pacific Mail Steamship Company*, (17 How., 600,) it was distinctly ruled that no objection would lie to the recovery of a tax which had been paid under compulsion by a collecting officer, on the ground that the assessment by the assessor was in the nature of a judicial act. The court said: "The assessment was not a judicial, but a ministerial act, and as the assessors exceeded their powers in making it, the officer (the collector) is not protected. The payment of the tax was not voluntary, but compulsory, to prevent the sale of one of the steamships."

We remark, secondly, on the first question before stated, that this court has twice, at least, solemnly and deliberately decided that an action for money had and received is the known and appropriate remedy of the common law, applied to cases of illegal assessment to protect the citizen from illegal taxation and duties levied unlawfully by public officers; that the action will lie in all cases to recover back money which a person pays to a revenue or other public officer in order to obtain possession of his goods from the latter, withheld upon an illegal demand or claim, *colore officii*, or, if the property is not in the actual possession of the officer, to save the goods from distress and sale; and that payment to an agent or public officer of the government, with notice that the money is wrongfully de-

manded, and protest against the legality of the demand, will, at common law, create a liability on the part of the agent or officer who shall pay over to the government in despite of such notice.

Elliott *vs.* Swartwout.—(10 Peters, 149.)

Bend *vs.* Hoyt.—(13 Peters, 267.)

Hays *vs.* Steamship Company.—(17 How., 600.)

In the presence of the careful exposition of the law on these points by this court, we are warranted in treating them as, in the highest sense, *adjudicated*. If the foregoing authorities do not sustain the right of the complainant according to the common law, to recover back the present duty, if it is illegal, after payment under the compulsion of the collector's warrant, then their import is indeed obscure.

(2.) The second question is as to the effect of the third section of the act of March 3, 1865, which provides: "*That the gross amount of all duties, taxes, and revenues received or collected, &c., shall be paid by the officers, collectors, or agents receiving or collecting the same, daily into the treasury of the United States, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description whatever.*"—(13 Stat., 483.)

The argument may be pressed that this provision is to have the same effect upon the liability of the collector and the right of the tax-payer to recover, as was attributed by this court to the act of 1839, in the case of Cary *vs.* Curtis, and that, therefore, it takes away the right to sue for duties paid under protest, excluding all basis for an implied promise of repayment by the officer, and rendering void an express promise by him.

On this point we remark:

(*a*) That, by force of the doctrine of *noscitur a sociis*, the words "*claims of any description whatever*" are to be construed to mean claims of the collector in which he is personally interested, and not to embrace moneys received for duties paid under protest.

(*b*) That it is to be conclusively presumed that Congress intended that the obligation and duty here imposed upon the collector should have no other effect than that which, according to its own view, as expressed in the act of 1845, chap. 22, should have been attributed to the act of March 3, 1839. The Supreme Court, in Cary *vs.* Curtis, (3 How. 242,) having decided that section 2 of the act of 1839 took away the action of assumpsit from parties paying duties under protest, Congress, in 1845, provided that the act of 1839 should not be so construed as to impair the right to that action. This is a legislative definition of the meaning of such legislation as the act of 1839; and the act of 1865 (section 3) must be presumed to have been intended by Congress for the same purpose, and to have the same meaning and effect as the act of 1839, and no other.

(*c*) The act of 1864 (section 44) and the act of 1866 (section 9) expressly provide for indemnifying the collectors for moneys recovered against them in any court for any internal duties.—(13 stat., 239; 14 Stat., 111.)

The legislative recognition, in section 44 of the act of 1864, and sec. 9 of the act of 1866, of the liability of the collectors, in proper cases, still stands unaffected by the provision in section 3 of the act of 1865.

These remarks constitute a conclusive answer to any argument against the subsistence of the right of suit

against collectors of internal revenue, based on the provision of section 3 of the act of 1865.

We say, then, that according to the common law, and under the acts of 1864, 1865, and 1866, every person who may be assessed illegally for internal taxes, may recover them back, if he pay them under compulsion and protest, in an action of assumpsit against the collector.

A further recognition of the right to sue a collector for the recovery of a tax alleged to have been illegally assessed is contained in section 19 of the act of July 13, 1866, (14 Stats., 152.) The provision is, "that no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said commissioner be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: *Provided*, That if said decision shall be delayed more than six months from the date of said appeal, then said suit may be brought at any time within twelve months from the date of such appeal."

II. *The liability of the assessor in an action of trespass, or trespass on the case, for damages suffered by reason of the execution of the assessment, if illegal, by the collector, is also clear.*

Chief Justice Shaw says, in Massachusetts, that the common and ancient course was to bring "trespass against the assessors, in all cases where the plaintiff intended to hold that he was not liable at all, and that the tax was wholly void. It proceeded on the ground that, in trespass, all are principals, including those who command an illegal act to be done."

Lincoln *vs.* City of Worcester, 8. Cush., 58.
Dillingham *vs.* Snow, 5 Mass., 558.
Freeman *vs.* Kenney, 15 Pick, 46.
Dickenson *vs.* Billings, 4 Gray, 45.
Thurston *vs.* Little, 3 Mass., 429.
Richards *vs.* Daggett, 4 Mass., 534.
Stetson *vs.* Kempton, 13. Mass., 272.
Thayer *vs.* Stearns, 1 Peck, 482.

In Pennsylvania the law is the same:
Moore *vs.* Allegheny City, 6 Harris, 58.

And in New York also:
Saunders *vs.* Springsteen, 4 Wend., 429.
In Matter of Mount Morris Square, 2 Hill, 29.
Weaver *vs.* Devendorf, 3 Denio, 120.
Prosser *vs.* Secor, 5 Barb., 611.
The People *vs.* Supervisors of Chenango county, 1 Kernan, 563.

And also in Maine:
Ford *vs.* Clough, 8 Greenleaf, 334.

Sec. 44 of the act of 1864, and sec. 9 of the act of 1866, expressly provide for indemnifying the assessors for suits brought against them by reason of anything done in the due performance of their official duties.—(14 Stats., 111.) They may be held, therefore, to impliedly authorize the remedy suggested against assessors of internal revenue.

Second Point.

The jurisdiction of courts of equity to control by injunction the action of officers of this description has been denied and repudiated almost as often as it has been attempted to be invoked; and it is believed that no case of authority can be found, in all the volumes of English and American Equity Reports, where the jurisdiction was controverted, in which the court enjoined a tax or revenue officer from proceeding to collect a tax illegally assessed, on the ground of equity alone presented by this bill.

(*a*) In *England*, it is believed, after careful examination of the books, a bill for an injunction against a collector of customs or excises has never been sustained. This is the strongest negative evidence that could be adduced against the possession of such a jurisdiction as is here claimed for chancery.

(*b*) In *Massachusetts* we have good authority for the assertion that "*no suit in equity is found reported, or is known to have been instituted against either collectors or assessors of taxes.*"—(Brief of Messrs. Dana and Field, in case of Lowell *v.* Pierce, U. S. C. C. Mass.. Oct. T., 1865, p. 8.)

(*c*) In *Pennsylvania*, the supreme court, in Hughes

v. Kline, (6 Casey, 231,) declared that equity possessed no jurisdiction to review the judgment of assessors of taxes.

(d) In *Rhode Island* the subject was considered with great care by the supreme court in the case of Greene *v.* Mumford, collector, (5 Rhode Island, 474;) and the notion was utterly repudiated by the court that there was any general jurisdiction in equity to restrain the collection of the ordinary public revenue taxes, though they be illegal.

(e) In *Illinois* equity cannot interfere with the collection of a tax, unless it is levied by a body having no authority of law therefor.—(Town of Ottawa *v.* Walker, 21 Ill., 610.)

(f) In *New York* the cases of this character, in which injunctions were applied for, are multitudinous. But it is thought that the reports of that State contain no *good case* (in which the point of jurisdiction was contested) in favor of this application.

In the following cases equity jurisdiction in this class of cases was denied:

Mooers *v.* Smedley, 5 Johns., Ch. R., 28.

Wiggins *v.* Mayor, &c., of New York, 9 Paige, 17.

Mayor, &c., *v.* Meserole, 26 Wend., 132, (overruled the chancellor in 8 Paige, 198.)

Van Doren *v.* Mayor, &c., of New York, 9 Paige, 388.

Livingston *v.* Hollenbeck, 4 Barb., Sup. C. R., 10.

Bouton *v.* The City of Brooklyn, 7 How. Pr. R., 198.

Wilson *v.* The Mayor, &c., of New York, 4 E. D. Smith's R., 706.

There are other New York cases reported, in which bills in equity were entertained in cases of illegal assessment of taxes; but it is thought that in *all* of them the question of jurisdiction was not raised, by tacit agreement of parties, or was expressly waived by them. These cases are all mentioned in the exhaustive opinion of Woodruff, J., in Wilson *v.* The Mayor, &c., of New York. (Supra.)

The question seems to have been finally settled in New York by the court of appeals, in Heywood *v.* City of Buffalo, (14 N. Y. R., 534,) all the judges holding that equity should not be applied to, to restrain the collection of a tax or assessment which was void.

(*g*) In *Connecticut* the same doctrine prevails.—(Dodd *v.* City of Hartford, 25 Conn. 238.)

(*h*) Bills in equity, in at least six cases, are known to have been exhibited in the several circuit courts for New York, New Jersey, and the eastern district of Pennsylvania, praying injunctions against assessors and collectors of internal revenue, but the learned justices, NELSON, BETTS, GRIER, CADWALADER, and FIELD, seem to have all concurred in opinion that the jurisdiction did not exist, and that the bills should be dismissed.

Third Point.

The two cases in which this court interposed the authority of equity for the protection of parties against trespasses on the part of collectors of taxes, were cases in which relief was sought against State officers who were proceeding to execute State laws judicially determined to be in violation of the Constitution of

the United States, and therefore void, and consequently laws incapable of affording any protection to the persons who attempted to carry them into execution.

OSBORN *v.* U. S. BANK, 9 WHEATON, 816.

The court determined :

1st. That the law of Ohio, levying an annual tax of $50,000 on each office of discount and deposit of the Bank of the United States in that State, was unconstitutional, and furnished no authority or protection to the State officers.

2d. That it was morally certain that the effect of the execution of the laws would be the total destruction of the franchise of the bank, and its expulsion from the State.

3d. That the case was, therefore, not the case of a public officer proceeding even under color of authority, but of an individual who had *usurped* power, without any authority of law, and not the case of a casual trespass, but a continuing trespass that would have resulted in total annihilation of the franchise of an important fiscal agent of the general government.

Of course injunction was the proper, because the only adequate, remedy in such a case.

DODGE *v.* WOOLLEY, 18 How., 331.

This was the case of a bill in equity, exhibited by a stockholder of a bank to prevent the officers of a State from collecting an *unconstitutional* tax, which the directors of the institution, by a breach of trust, refused to resist by proper suit.

This, also, was a clear case, where the unconstitutionality of the law, under which the officer claimed authority, deprived him of any protection whatever, and placed him in the position of a *usurper of a franchise*, and also where the breach of trust, on the part of the bank directors, gave the stockholder a clear ground on which to apply for equitable relief.

The present case is clearly distinguishable in principle from the cases just cited.

There is no pretence here,

1st. That the law is unconstitutional; or

2d. That the particular tax is not assessable by law against parties liable to pay it; or

3d. That the complainants are not within the jurisdiction of the assessor, and may not be assessed by him; or

4th. That the validity of the assessment depends upon *any other* question than the question, *whether the complainants are liable, under the law, to pay the tax;* or

5th. That by the statute, it is not the duty of the assessor to determine that question, in the first instance.

The effort, therefore, is to induce this court, on a bill in equity, to review the judgment of a revenue officer on a question which he has full jurisdiction by law to determine as between the government and the tax-payer.

If the present question of construction or interpretation of this revenue law may be thus brought before this court, then every question of like character, under every revenue law—internal as well as external—may be subjected to the decision of this court;

and while it is deliberating and deciding the taxes will remain unpaid, and the public credit may be shaken to its foundation.

Fourth Point.

No lawyer or judge seems to have dreamed before these internal revenue laws were enacted, that the act of 1833—the Force Bill—conferred any authority upon the circuit courts to restrain the collection of any duty claimed to be payable to the United States.

Revenue laws have existed since the establishment of the government, but we have yet to hear of a bill in equity brought to restrain a collector of customs from assessing and collecting a duty, claimed to be imposed by a tariff law, on an article of imported merchandise. The fact that such an experiment with the jurisdiction of courts of equity, was never made, under the act of 1833, before the organization of our system of internal revenue, is sufficient to raise the strongest judicial doubt that equitable jurisdiction does not exist in this class of cases; and thus to induce the dismissal of the present bill, in view of the principle, stated by Mr. Justice Baldwin, that injunctions will not be awarded "*in doubtful cases, or in new ones not coming within well established principles.*"—(Bonaparte *vs.* Cam. & A. R. R. Co., 1 Bald., 218.)

Fifth Point.

There is no well considered case anywhere to be found in which an injunction was granted against a public officer of the government restraining him from doing an act in the line, and within the exercise of

the duties confided to him by a valid law; and in every case where such an officer was restrained, by the process of injunction, it clearly appeared that the officer had arrogated to himself a power not vested in him by law.

1. The strongest statement of the jurisdiction in the case of public officers is by Lord Cottenham in Frewin *v.* Lewis.—(4 Mylne & Craig, 255.) But even that excludes this case from equitable cognizance.—(See Adams's Equity, 212.)

Applying this principle to the present case, how can the jurisdiction of the court in equity be supported? The collector defendant is acting under an assessment, *every question involved in which it was within the statutory competency of the assessor to decide.* He had jurisdiction of the party, and the entire subject-matter. Did the assessor exercise a power *not* granted when he proceeded to determine the liability of the complainants to pay this tax? The question is *not* whether he decided wrongly on the facts and the law of the case, but whether he had *authority* to decide. *Was he within the line and exercise of the duty confided to him by statute when he undertook to determine the liability of the company?* These are the questions which a court of equity must answer when an injunction in such a case is asked; and, if answered in the affirmative, *no mistake of fact or of law on the part of the assessor, in deciding their* liability, *can avail the complainants as a ground for the exercise of the extraordinary relief applied for.* The special duty cast upon the assessor by the statute and his commission was the decision of the very question now agitated, of the

liability of this company to pay the duty under section 120 of the act of 1864. *The assessment cannot therefore be held to be a void assessment.* It is, at all events, merely irregular, erroneous, voidable.

2. But again, even in the case of a void authority exercised by a public officer, an injunction never issues on the application of a private individual unless it appear that he is about, by such exercise of authority, to do any act which brings the case within one of the well-defined heads of equity jurisdiction; as an act in breach of trust, in derogation of a contract which ought to be specifically performed, *or an act of irreparable mischief to the real estate of another.*

Attorney General *vs.* Forbes, 2 M. & C., 132, 130, 135.

It may be doubted whether a public tax officer was ever held liable to be enjoined in any case where the anticipated injury would effect personalty alone.

In the case of real estate, however, the question, whether the damage is irreparable or not, is a conclusion of law which the court draws, according to its own rule, from the facts and circumstances in regard to the trespass; and the *criterion* by which it determines the character of the mischief is the ability of an action at law to restore the party to his former condition—to make him whole.—(Hilliard on Injunctions, 281. Adams on Equity, 207.)

Sixth Point.

There is no jurisdiction to enjoin the collection of this tax on the ground that it may "cast a cloud" upon the complainant's real estate.

It may be said that equity often interferes to remove a *cloud* from the title to realty, and that the proceedings instituted for the assessment and collection of the tax, in the present instance, may or do throw a cloud over the title of the company to its real estate. The court of errors, of New York, in the case of Mayor, &c., of Brooklyn *vs.* Meserole, (26 Wend., 138,) decided, that, in legal contemplation, no such doubt could be cast over title to land by such proceedings as entitled chancery to interpose, and the same decision was made by the supreme court of Rhode Island in the case of Green *vs.* Mumford, collector.—(5 Rhode Island, 476.) See also Van Doren *vs.* Mayor, &c., of New York (9 Paige, Ch. R., 390.) The ground on which the courts proceeded was, that if the proceedings are *void* the title is not affected by the sale made to satisfy the tax, and if they are merely *voidable* or irregular, the only remedy afforded is by application and appeal to those officers who have authority to revise and reverse the proceedings of the assessor and collector. It will be observed, also, that section 30 of the act of 1864, (13 Stats., 235,) provides for the redemption, within one year, of lands sold for the non-payment of internal duties.

Seventh Point

The only subject of the present complaint is that the appellants were overrated; and their remedy therefor is by application to the assessor for abatement, and by appeal to the Commissioner of Internal Revenue, whose decision, we contend, must be final.

1. Sections 19 and 44 of the act of June 30, 1864, (13 Stats., 229, ibid., 239,) and section 9 of the amen-

datory act of July 13, 1866, (14 Stats., 102, 111,) provide for the application and appeal here mentioned in all cases of erroneous assessment of internal duties.

2. Under the systems of taxation prevailing in several of the States, which are analagous to the existing national system of internal revenue law, it has been uniformly held that the jurisdiction to decide questions of abatement is *exclusively* vested in the assessors, who are liable to be corrected only by those officers, county commissioners and the like, who have authority to revise, on appeal, the decisions of the assessors; and this is held to be a sufficient legal remedy in such cases, although the officers do not hold by a judicial tenure, and the State constitutions contain the same provisions as articles 5 and 7 of the amendments of the Constitution of the United States.

See the following authorities for the law in Massachusetts:

Osborn *vs.* Inhabs. of Denvers, 6 Pick., 100.

Little *vs.* Greenleaf *et al.*, 7 Mass., 238.

Howe *vs.* City of Boston, 7 Cush., 274.

Lincoln *vs.* Worcester, 8 Cush., 64.

Middlesex R. R. Co. *vs.* City of Charlestown, 8 Allen, 332.

And for the law in Pennsylvania:

Hughes *vs.* Kline, 6 Casey, 231.

Moore *vs.* Allegheny City, 6 Harris, 58.

3. This court has held, under the provisions of the foreign revenue collection acts, that in the absence of fraud the decision of the customs appraisers as to the character and the dutiable value of imported merchandise is final and conclusive, and this on the ground that when power is delegated to any public

officer over a subject-matter, and its exercise is confided to his judgment or discretion, his acts, unless impeached for fraud, or void for want of jurisdiction, are to be regarded as binding and valid as to the subject-matter.

Bartlett *v.* Kane, 16 How., 272.

Belcher *v.* Linn, 24 How., 522.

Jasigi *v.* The Collector, 1 Wallace, 381.

U. S. *v.* Arredondo, 6 Peters, 691.

3. It is of the highest importance that the courts of the United States should not constitute themselves appellant tribunals for the revision and correction of the decisions of the assessors within the sphere of the jurisdiction conferred upon them by statute, and that they should incline strongly and strenuously against asserting the judicial power in cases under these revenue acts, where the only ground presented for relief is error of the officers in the interpretation or construction of the law. And this becomes the more apparent when it is remembered that the jurisdiction of the circuit court in cases arising under the revenue laws is expressly limited to those cases "FOR WHICH OTHER PROVISION IS NOT ALREADY MADE BY LAW."—(13 Stat., 241 ; 4 Stat., 632.)

Eighth Point.

The judgment of the circuit court should be affirmed.

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